Jurisdictional Statement

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No.

In the Supreme Court of the United States

October Term, 1981

VIGILANT INSURANCE COMPANY,
Appellant,

vs.

LYDIA PITONIAK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

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QUESTION PRESENTED

WAS THE EMPLOYER DEPRIVED OF ITS DUE PROCESS RIGHT TO A FAIR HEARING GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE THREE MEMBER PANEL OF THE ADMINISTRATIVE AGENCY THAT DECIDED THIS CASE INCLUDED TWO MEMBERS THAT WERE "REPRESENTATIVE OF EMPLOYEE INTERESTS IN THE STATE . . .", ONE MEMBER THAT WAS LATER APPOINTED AS "REPRESENTATIVE OF EMPLOYEE INTERESTS IN THE STATE . . .", AND NO MEMBERS THAT WERE "REPRESENTATIVE OF EMPLOYER INTERESTS OF THE STATE"?*

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*The parties to the proceedings in the Michigan Supreme Court were only the employer, Borman's, Inc., its insurer, Vigilant Insurance Company, and the employee, Lydia Pitoniak. Borman's, Inc., is only an insured and has no interest in this matter.

Certain "employer representatives" and "employee representatives", Ferris Arnold, Nancy Day, John J. Hays, John Houston, Robert W. Kehres, and Janet Huntly Phelps, intervened in this case at the Court of Appeals. These "employee" and "employer" representatives, however, failed to appear in the Michigan Supreme Court. The defendant believes they no longer have an interest in this matter.

Although Allstate Insurance Company appears in the caption of the Court of Appeals' decision, it, in fact, never appeared at the Workers' Compensation Appeal Board or any of the higher Michigan courts. The defendant believes Allstate Insurance Company has no interest in this matter.

Vigilant Insurance Company has the following parent companies, subsidiaries, and affiliates:

The Chubb Corporation
Federal Insurance Company
Pacific Indemnity Company
Vigilant Insurance Company
Great Northern Insurance Company
Northwestern Pacific Indemnity Company
Texas Pacific Indemnity Company

(Continued on following page)

Footnote continued—

Chubb Custom Insurance Company
Chubb Syndicate Inc.
Chubb Insurance Company of Canada
La Federation Europeenne Compagnie d' Assurances, S.A.
Chubb Life Insurance Company of America
The Colonial Life Insurance Company of America
United Life and Accident Insurance Company
Bellemead Development Corporation
Chubb & Son Inc.
Chubb Custom Market Inc.
Federal Business Products, Inc.
Argos Companhia de Seguros
"Bolivar", Compania de Seguros del Ecuador, S.A.
La Federacion Compania de Seguros C.A.
La Federacion Compania de Seguros S.A.
Seguros Illimani S.A.

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No.

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OPINIONS BELOW

The order of the Michigan Supreme Court dated September 2, 1981, denied the appellant's Application for Leave to Appeal to that Court. The opinion of the Michigan Court of Appeals and the opinion of the Michigan Workers' Compensation Appeal Board as well as the Michigan Supreme Court order are set out in the Appendix. The decision of the Michigan Court of Appeals is reported as *Pitoniak* v. *Borman's, Inc.*, 104 Mich App 718; 305 NW2d 305 (1981). The decision of the Workers' Compensation Appeal Board is published at 1980 WCABO 1099 (Opinion

No. 296). The Appeal Board decision reversed a decision of an Administrative Law Judge mailed August 2, 1977, denying the plaintiff benefits. The Workers' Compensation Appeal Board Opinions (WCABO) are published by Opinions Press, P.O. Box 1095, Big Rapids, Michigan 49307. The decision of the Administrative Law Judge is unpublished. Both the Workers' Compensation Appeal Board opinion and the decision of the Administrative Law Judge are set out in the appendix.

JURISDICTION

The order of the Michigan Supreme Court in this case denying the appellant's Application for Leave to Appeal was filed on September 2, 1981. The appellant's Application for Leave to Appeal challenged the Court of Appeals' decision finding that a Workers' Compensation Appeal Board panel made up of two Members "representative of employee interests in the state. . ." and one undesignated Member did not violate the due process clause of the fourteenth amendment of the United States Constitution. The Court of Appeals decision, published as *Pitoniak v. Borman's, Inc.*, 104 Mich App 718; 305 NW2d 305, found that this "unbalanced panel" was not one where "the probability of actual bias on the part of the Judge or decision maker is too high to be constitutionally tolerable". *Withrow v. Larkin*, 421 U.S. 35, 47; 95 S. Ct. 1456; 43 L. Ed. 2d 712 (1975). It, therefore, found the appellant was not denied its right to a fair hearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101(c).

Notice of appeal to the Supreme Court of the United States was filed with the Michigan Supreme Court on October 1, 1981, and the Michigan Court of Appeals on November 4, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV, §1 provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Michigan Compiled Laws, MCLA 418.251; MSA 17.237 (251), 1978 P.A. 456 effective October 16, 1978, reads:

> "Sec. 251. (1) A worker's compensation appeal board is created, referred to in this act as the board. The board shall consist of 15 members, a majority of whom shall be attorneys at law licensed to practice in the courts of this state. Of the board members, 6 shall be representative of employee interests in the state, 6 members shall be representative of employer interests of the state, and 3 members shall be representative of the general public. A member of the board shall devote his or her entire time to and personally perform the duties of the office and shall not engage in other business or professional activity. The governor, with the advice and consent of the senate, shall appoint the members for a term of 4 years, and until their successors are appointed and qualified. A vacancy shall be filled for an unexpired term in the same manner as the original appointment. The governor shall designate the chairperson of the board from the general public members.

(2) An appointment made to the board after the effective date of this subsection shall reflect the membership required by subsection (1)."

Michigan Compiled Laws, MCLA 418.261; MSA 17.237 (261)(2), 1978 P.A. 456 effective October 16, 1978, reads in relevant part:

"(2) A matter pending on review shall be assigned to a panel of 3 members of the board for disposition. The composition of panels shall be alternated so that each member of the board serves on panels with other members of the board with a frequency which is as substantially equal as possible. The decision reached by a majority of the assigned 3 members shall be the final decision of the board. If a majority of the assigned 3 members are unable to agree, the matter shall be reviewed by the entire worker's compensation appeal board."

1980 P.A. 357 effective January 1, 1981, amended the above provisions to require that particular panels in each case be made up of one "employee representative", one "employer representative" and one "public representative". The amendments read:

"Sec. 251. A worker's compensation appeal board is created, referred to in this act as the board. The board shall consist of 15 members, a majority of whom shall be attorneys at law licensed to practice in the courts of this state. Of the board members, 5 shall be representative of employee interests in the state, 5 members shall be representative of employer interests of the state, and 5 members shall be representative of the general public. A member of the board shall devote his or her entire time to and personally perform the duties of the office and shall not engage in other business or

professional activity. The governor, with the advice and consent of the senate, shall appoint the members for a term of 4 years, and until their successors are appointed and qualified. A vacancy shall be filled for an unexpired term in the same manner as the original appointment. The governor shall designate the chairperson of the board from among the members to serve at the pleasure of the governor."

Sec. 261 (2) A matter pending on review shall be assigned to a panel of 3 members of the board for disposition, with each panel comprised of 1 member each of the employee, employer, and general public representatives appointed pursuant to section 251. The decision reached by a majority of the assigned 3 members shall be the final decision of the board."

Michigan Compiled Laws, MCLA 418.861; MSA 17.237 (861) reads:

"The findings of fact made by the board acting within its powers, in absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board, if application is made by the aggrieved party within thirty days after such order by any method permissible under the rules of the courts of the laws of this state."

STATEMENT OF THE CASE

The plaintiff, Lydia Pitoniak, was employed by Borman's, Inc. The appellant, Vigilant Insurance Company, was the workers' compensation insurance carrier for Borman's, Inc. On July 18, 1975, the plaintiff filed a Petition for Hearing with the Michigan Bureau of Workers' Disability Compensation. A hearing was held before Admin-

istrative Law Judge Joseph L. Chylinski and, in a decision mailed August 2, 1977, Judge Chylinski denied benefits.

The plaintiff appealed to the Michigan Workers' Compensation Appeal Board where the case was submitted to a panel consisting of Members William C. Marshall, Jr., Ferris Arnold and Robert W. Kehres. At the time of the hearing, Member Marshall, having been a Member of the Appeal Board before October 16, 1978, the effective date of MCLA 418.251; MSA 17.237 (251) which established the designations of Members, had not yet received a designation. When he was reappointed in January of 1981, Member Marshall was designated as a Member "representative of employee interests in the state" in accord with amended section 251. At the time of the hearing in this case, Members Arnold and Kehres were both designated as "representative of employee interests in the state" in accord with amended section 251.

Thus, the Workers' Compensation Appeal Board panel that decided this case was made up of two members selected to the Appeal Board because they were "representative of employee interests in the state" and one Member who, about eight months later, was appointed to the Appeal Board because he was "representative of employee interests in the state". There were no Members of the panel who were selected because they were either "representative of employer interests of the state" or because they were "representative of the general public". MCLA 418.251; MSA 17.237 (251). This "unbalanced" panel reversed the decision of the Administrative Law Judge and awarded the plaintiff benefits in an opinion mailed April 17, 1980.

The defendant appealed to the Michigan Court of Appeals and argued, among other things, that the "unbalanced" nature of the panel that decided this case deprived

it of its right to a fair hearing under the fourteenth amendment to the Constitution of the United States. In a decision released on March 18, 1981, and published at 104 Mich App 718; 305 NW2d 305 (1981) the Court of Appeals found that the defendant was not deprived of its constitutional right to a fair hearing.

The defendant filed an application for leave to appeal to the Michigan Supreme Court. In an order filed on September 2, 1981, the Michigan Supreme Court denied the defendant's application stating:

> "On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not pursuaded that the questions presented should be reviewed by this Court."

The defendant raised the federal question at the earliest stage possible. No oral argument was scheduled for this case and the defendant was unaware of the makeup of the Appeal Board panel until it received the decision. (See Appendix H) Furthermore, it has been a long established Appeal Board doctrine that constitutional questions may not be decided by the Appeal Board. *Dation* v. *Ford Motor Co.*, 314 Mich 152 at 159; 22 NW2d 252 (1946). See also *Cruz* v. *Chevrolet Grey Iron*, 1973 WCABO 488 at 489 (Opinion No. 103), and *Seifferlein* v. *City of East Detroit*, 1978 WCABO 3145 (Opinion No. 543).

Additionally, the defendant could not possibly have raised the issue of a violation of its fourteenth amendment Constitutional right to a fair hearing on rehearing at the Appeal Board because the Appeal Board does not have the power to grant a rehearing. *Guss* v. *Ford Motor Co.*, 275 Mich 30; 265 NW 515 (1936).

The defendant then raised this question at the Michigan Court of Appeals. After granting its application for

leave to appeal, the Court found, in a decision decided March 18, 1981, that the defendant was not deprived of its constitutional right to a fair hearing. 104 Mich App 718 at 722-728; 305 NW2d 305 at 306-309 (1981).

The defendant then filed a timely application for leave to appeal with the Michigan Supreme Court on April 7, 1981. G.C.R. 1963, 853.2.

Argument I of the appellant's brief in support of its application stated:

> "The defendants were deprived of their due process right to a fair hearing because, while the Appeal Board Panel that decided this case did include two members that were "representative of employee interests of the state . . ." and a third Member who was later appointed as an "employee representative", there were no panel Members that were "representative of employer interests in the state."

The Michigan Supreme Court, as indicated above, denied this application because it was "not pursuaded that the questions presented should be reviewed by this Court."

THE QUESTION IS SUBSTANTIAL

The Workers' Compensation Appeal Board is the final fact finder in workers' compensation cases in the State of Michigan. The reviewing courts, the Court of Appeals and the Supreme Court, may only review questions of law. MCLA 418.861; MSA 17.137 (861). This Court has stated that one of the basic requirements of due process is a hearing before "a 'neutral and detached' hearing body . ." *Morrisey* v. *Brewer,* 408 U.S. 471 at 489; 92 S. Ct. 2593; 33 L. Ed. 2d 484 (1971). It has also indicated that "an impartial decision maker is essential". *Goldberg* v. *Kelly,*

397 U.S. 254 at 271; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970). In *Withrow* v. *Larkin*, this Court stated:

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' *In re Murchison*, supra, at 136; cf. *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927) . . ." *Withrow* v. *Larkin*, 421 U.S. 35, 46-47; 95 S. Ct. 1456; 43 L. Ed. 2d 712 (1975).

There can be no trial or hearing that is more unfair than one in which the final fact finder in a dispute between an employer and an employee is made up of two Members appointed because they are "representative of employee interests in the state . . ." and a third Member who is later appointed because he is also "representative of employee interests in the state." There are several reasons for this. First, as pointed out by this Court in *Withrow* v. *Larkin*, supra, 421 U.S. at 47, this "is a case where the adjudicator has a pecuniary interest in the outcome. . ."

Appeal Board Members are appointed for terms of four years. MCLA 418.251; MSA 17.237 (251). When their terms expire, they cannot be reappointed with the same designation if their voting record shows they are no longer "representative of" that designation. For example, an individual who is appointed to the Appeal Board because he or she is representative of "employee interests in the state", but whose voting record shows that he or she is really "representative of employer interests of the state" cannot be reappointed in the same classification. To do so

would violate the statutory requirement that the Member be representative of "employee interests". Certainly, if an attempt was made to reappoint a person whose voting record showed that he or she was really representative of "employer interests", either mandamus, prohibition, or an injunction could be brought to stop the appointment. See, *Wayne County* v. *State Treasurer*, 105 Mich App 249; 306 NW2d 468 (1981); *United States Cold Storage Corp.* v. *Detroit Board of Assessors*, 349 Mich 81; 84 NW2d 487 (1957); *Reid* v. *Civil Service Commission*, 301 Mich 137, 3 NW2d 41 (1942); and *Hiers* v. *Detroit Supt. of Schools*, 376 Mich 225; 136 NW2d 10 (1965).

In *O'Donoghue* v. *United States*, 289 U.S. 516, 531; 53 S. Ct. 740; 77 L. Ed. 1356 (1932), this Court quoted from Alexander Hamilton's famous statement in The Federalist, No. 79:

> "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" (Emphasis in the original)

If an Appeal Board Member could be denied reappointment if his or her voting record varied from his original designation, there would be a substantial pecuniary interest in continuing the voting pattern he was selected for. When there is no one on the panel to balance out this pecuniary interest and, in fact, all three panel Members have the same pecuniary interest because all three are "employee representatives", a fair hearing has not been given.

The Michigan Court of Appeals dismissed this claim as "tenuous". 104 Mich App at 725; 305 NW2d 305 at 307 (1981). It is, however, less tenuous than the relationship in *Ward* v. *Village of Monroeville*, 409 U.S. 57; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972), found unacceptable by this Court. In that case the mayor, who judged the petitioner's case,

also had the responsibility for village revenue production. While it is true that the village's revenue was enhanced by the petitioner's conviction, it is also true that the mayor's job was not threatened. As pointed out by Mr. Justice White and Mr. Justice Rhenquist in the dissent, the "mayor who judged this case had no direct financial stake in its outcome." 409 U.S. at 57; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972). Presumably, he was elected and his salary was established by statute or ordinance. Neither his job nor his salary was directly dependent on his decisions. The only influence upon him to convict the petitioner was that, if the village did not have sufficient income, an increase in taxes could have resulted. *Ward* v. *Village of Monroeville,* supra, 409 U.S. at 58 footnote 1; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972). Even this, however, was unacceptable.

The Appeal Board Members in the case at bar had a greater, more direct financial stake in their voting pattern than the mayor in the *Ward* case. As indicated above, if the Appeal Board Member changes his or her colors, that Member cannot legally be reappointed to the same classification and, therefore, could lose his or her job and income. This interest is more like the "direct, personal, pecuniary interest(s)" found unacceptable by this Court in *Tumey* v. *Ohio,* 273 U.S. 510; 47 S. Ct. 437; 71 L. Ed. 749 (1927). In that case, the judge had a direct financial interest in the petitioner's conviction. This Court stated:

> ". . . The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . denies . . . due process of law." 273 U.S. at 532; 47 S. Ct. 437; 71 L. Ed. 749.

When an individual's job is dependent on his or her voting pattern, this offers "a possible temptation to the average man. . ."

Beyond the pecuniary interests of the Members, this Court should be alert to the possibilities of bias that may "lurk in the way particular procedures actually work in practice." *Withrow*, supra, 421 U.S. at 54. In the case at bar there is the very real possibility that Appeal Board Members will have prior biases and allegiances which will deny a litigant a fair hearing when there is not also a panel Member with the opposite bias or allegiance balancing out the panel.

Appeal Board Members who are appointed because they are representative of "employer interests" or "employee interests" are appointed because they have a particular point of view. Generally, they have worked for either "employee" or "employer" interests and, naturally, view things from this perspective. For instance, while an "employee" representative might give complete credence to the employee's complaint of pain, the "employer" representative would place more value on a doctor's finding of no objective signs to support the complaint of pain. When an Appeal Board panel is made up of two "employee" representatives and a third who, while undesignated, is later appointed as an "employee" representative because he is "representative of employee interests in the state", it cannot be denied that there are "possibilities of bias that may lurk in the way particular procedures actually work in practice." This is the "probability of unfairness" that the fourteenth amendment does not permit. *In re Murchison*, 349 U.S. 133; 75 S. Ct. 623; 99 L. Ed. 942 (1955).

The question is rendered even more substantial by the number of Michigan cases affected by it. MCLA 418.251; MSA 17.237 (251) began to require designations when it

became effective October 16, 1978. At the same time, MCLA 418.261; MSA 17.237 (261) required each Member to serve on panels with other Members "with a frequency which is as substantially equal as possible." Therefore, as each new Member was appointed to the Appeal Board after October 16, 1978, the number of designated Members increased and the likelihood that a particular panel would be "unbalanced" also increased. This occurred until the law was amended in 1980 by Act number 357 effective January 1, 1981. Thus, "unbalanced" panels existed for two and one quarter years.

The published Appeal Board opinions show that in 1978 there were six hundred twenty-nine opinions. Probably some small percentage of these were made up of "unbalanced" panels. In 1979, the published opinions show that there were seven hundred twenty Appeal Board opinions. Because more vacancies had opened up and more Members were designated, the percentage of "unbalanced" panels increased. In 1980 there were eight hundred sixty Appeal Board opinions. Because there were many more designated Members, a very large percentage of these panels were "unbalanced".

Therefore, between October 16, 1978, and January 1, 1981, there were literally hundreds of cases where either an employer or an employee was denied his or her constitutional right to a fair hearing. While major employers probably had the number of panels balanced against them come close to equaling the number of panels balanced in their favor, small employers and individual employees did not. In particular, it should be noted that an individual employee has only one case. If the panel was balanced against him and his case was close, he could, very easily, have been out of luck.*

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*This may be the reason the appellee's attorney conceded this issue at oral argument at the Court of Appeals.

It has been said that there is a right to appeal when a state court upholds the constitutionality of one of its statutes because "the state courts would be more jealous of local rights than of federal claims. . ." *Frankfurter* and *Landis, The Business of the Supreme Court,* 277 (1927). It seems obvious that this is what happened in the case at bar. Despite the denial of one of the most significant constitutional rights, the right to a fair hearing, the Michigan Court of Appeals and Supreme Court refused to find the Appeal Board procedure of assigning cases to unbalanced panels invalid. To do so could have required the reversal of literally hundreds of cases. To deny these litigants their right to a fair hearing was improper.

CONCLUSION

This Court should summarily reverse the decision of the Michigan Supreme Court and Court of Appeals and remand this case to the Supreme Court with instructions to reverse the decision of the Workers' Compensation Appeal Board and remand the case to the Appeal Board for a "fair hearing".

Alternatively, this Court should accept the case for plenary review as an appeal or, pursuant to 28 U.S.C. §2103, as a petition for certiorari granted.

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APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS, NO. 51660, PUBLISHED 3/18/81

STATE OF MICHIGAN
COURT OF APPEALS

No. 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

v

BORMAN'S INC. and VIGILANT INSURANCE COMPANY,
Defendants-Appellants,

and

ALLSTATE INSURANCE COMPANY,
Defendant.

Before: N.J. Kaufman, P.J., and M.J. Kelly and Cynar, JJ. M. J. Kelly, J.

Defendants Bormans, Inc. and Vigilant Insurance appeal by leave granted an opinion and order of the Workers' Compensation Appeal Board which reversed a prior decision of the administrative law judge and awarded to the plaintiff $101 per week in workers' compensation benefits.

The parties do not differ as to the facts on appeal. On February 13, 1973, plaintiff, a cashier who had worked for defendant Borman's since 1958, was involved in a non-work-related automobile accident. The accident resulted in

an injury to her left knee and other less severe injuries not at issue. Because of the injuries sustained in the accident, plaintiff was out of work for nine months. Plaintiff returned to work as a cashier on November 12, 1973, and continued working until May 6, 1974, when persistent pain and swelling in her affected knee required the plaintiff to seek further medical attention. On the latter date, Dr. Verne Johnson examined and recommended surgery for the plaintiff's knee. Since that time, the plaintiff has been unable to return to work.

In July, 1975, plaintiff filed a petition for a hearing before the Bureau of Worker's Compensation, alleging that the work she had done after she returned to her job aggravated the prior injury, making it impossible for the plaintiff to continue working. A hearing was held on October 28, 1976, at which the depositions of Dr. Richard Hall and Dr. Milton Green were introduced into evidence. At the hearing, plaintiff testified that she had instituted a law suit against the driver of the other car that was involved in the automobile accident and that the case had been settled for $50,000, of which the plaintiff received $33,500. The administrative law judge rendered his decision on July 14, 1977, holding that the plaintiff failed to sustain her burden by proving aggravation of the injury arising from employment with defendant Borman's.

On August 8, 1977, plaintiff filed an application for review with the Appeal Board, alleging that the administrative law judge's decision was contrary to fact and law. The Board granted plaintiff's application for review. In an opinion dated April 17, 1980, the Board found that plaintiff had sustained the burden of proof necessary to establish a compensable injury under the Workers' Compensation Act and also held that defendants were not entitled to a credit for the $33,500 plaintiff received from the settle-

ment of her tort suit. We granted the defendants' application for leave to appeal on September 5, 1980.

The defendants first allege that the composition of the three-member Appeal Board below, lacking a "representative of employer interests of the state", denied to defendants their due process right to a hearing before a fair and impartial administrative tribunal. US Const, Am XIV; Const 1963, art 1, § 17; *In re Murchison*, 349 US 133, 136; 75 S Ct 623, 625; 99 L Ed 942 (1955). The make-up of the Appeal Board at the time of the hearing was governed by MCL 418.251(1); MSA 17.237(1):

> "A worker's compensation appeal board is created, referred to in this act as the board. The board shall consist of 15 members, a majority of whom shall be attorneys at law licensed to practice in the courts of this state. Of the board members, 6 shall be representative of employee interests in the state, 6 members shall be representative of employer interests of the state, and 3 members shall be representative of the general public. A member of the board shall devote his or her entire time to and personally perform the duties of the office and shall not engage in other business or professional activity. The governor, with the advice and consent of the senate, shall appoint the members for a term of 4 years, and until their successors are appointed and qualified. A vacancy shall be filled for an unexpired term in the same manner as the original appointment. The governor shall designate the chairperson of the board from the general public members."

Under MCL 418.261(2); MSA 17.237(261)(2), the individual members of the Board are required to be rotated evenly among all panels:

> "A matter pending on review shall be assigned to a panel of 3 members of the board for disposition. The compensation of panels shall be alternated so that each member of the board serves on panels with other members of the board with a frequency which is as substantially equal as possible. The decision reached by a majority of the assigned 3 members shall be the final decision of the board. If a majority of the assigned 3 members are unable to agree, the matter shall be reviewed by the entire worker's compensation appeal board."

The defendants allege that this formula necessarily places at least two Board members, representing employee or employer interests respectively, on certain Appeal Board panels, thus creating a biased tribunal. In the instant case, two Board members representative of employee interests were teamed with a third member appointed as a representative of the general public.

A basic tenet of the constitutional right to due process is the availability of a hearing before an unbiased and impartial decisionmaker. *Crampton* v *Department of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), citing *Gibson* v *Berryhill*, 411 US 564, 579; 93 S Ct 1689; 36 L Ed 2d 488 (1973) and *In re Murchison, supra*. A party who challenges the impartiality of a judge or tribunal need not show actual prejudice; it is sufficient for disqualification if the situation is one in which "exprerience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable". *Withrow* v *Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712, 723 (1975), *Crampton* v *Department of State, supra*, 351. In the absence of a claim or finding of actual prejudice, we must analyze whether the potential for prejudice is too great to withstand constitutional scrutiny.

In *Crampton, supra,* 351, the Supreme Court outlined four situations presenting too great a risk of prejudice:

> "(1) has a pecuniary interest in the outcome,
>
> "(2) 'has been the target of personal abuse or criticism from the party before him';
>
> "(3) is 'enmeshed in [other] matters involving petitioner * * *', or
>
> "(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." (Footnotes omitted).

We will address the above factors *seriatim.*

A. *Pecuniary Interest.*

The Appeal Board members herein do not have a pecuniary interest in the litigation at issue, as that term was developed in *Ward* v *Monroeville,* 409 US 57, 60; 93 S Ct 80; 34 L Ed 2d 267 (1972) (pecuniary interest found where mayor, responsible for village finances, assessed fines for traffic ordinance violations), *Tumey* v *Ohio,* 273 US 510; 47 S Ct 437; 71 L Ed 2d 749 (1927), (impermissible pecuniary interest of village mayor whose salary was paid from fines assessed in "the liquor court") and *Gibson* v *Berryhill, supra* (pecuniary interest of optometric association excluding those optometrists employed by other entities barred judgment of alleged unethical conduct by nonmembers). Appeal Board members are compensated by the state for their services, which salary is appropriated by the Legislature. MCL 418.265; MSA 17.237(265). To argue as defendant does that Board members are motivated by the fear of denied reappointment is, we believe, too tenuous a connection to merit a finding of pecuniary interest.

B. *Personal Abuse or Criticism.*

This factor was found to raise a due process question in *Mayberry* v *Pennsylvania*, 400 US 455; 91 S Ct 499; 27 L Ed 2d 532 (1971), a decision in which the defendant leveled "highly personal aspersions, even 'fighting words' ", at the trial judge who later sat as trier of fact in the defendant's criminal contempt trial. However, our review of the record in the present case discloses no such personal abuse or attacks by either party.

C. *Enmeshed in Legal Matters in Which the Judge is Involved.*

Where the deciding judge opposed the litigant in a prior case, due process has been found to require a different trial judge for the litigant's subsequent criminal contempt charge. *Johnson* v *Mississippi*, 403 US 212; 91 S Ct 1778; 29 L Ed 2d 423 (1971). The present facts indicate no prior involvement of the parties to this action and the Appeal Board members.

D. *Prejudged the Merits of the Case Due to Prior Involvement.*

In *Withrow* v *Larkin, supra*, the Supreme Court held the mixture of investigative and adjudicative functions would constitute a denial of due process, if the aggrieved party could overcome the "presumption of honesty and integrity in those serving as adjudicators" by proof that "conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented". *Withrow* v *Larkin, supra*, 47. See also *Richardson* v *Perales*, 402 US 389; 91 S Ct 1420; 28 L Ed 2d 842 (1971). The *Withrow* Court also described its decision in *Morrissey* v *Brewer*, 408

US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972), as requiring that review of an initial decision be made by one other than the initial adjudicator.

Under MCL 418.255(1); MSA 17.237(255)(1), the Appeal Board is specifically empowered to "hear and decide all appeals from the orders of the hearing referees and director". Further, a Board member, once appointed, may not engage in other "business or professional activity". MCL 418.251(1); MSA 17.237(251)(1). Members of the Appeal Board are prohibited by law from engaging in investigative or other outside activities so there is no overlap with adjudicative functions. Our review of the record below also indicates no participation by Board members in the defendants' case prior to the filing of the appeal.

The most recent decision of the Supreme Court bearing on this due process question is *Hortonville Joint School District No. 1* v *Hortonville Education Association*, 426 US 482; 96 S Ct 2308; 49 L Ed 2d 1 (1976). In *Hortonville*, the Board of Education, with whom a teachers union had been bargaining for a collective bargaining agreement, instituted disciplinary proceedings to discharge certain members of the union who went on strike. Subsequent hearings were held on the proposed discharges, with the Board sitting as decisionmaker. The Board eventually discharged the striking teachers because their walkout was illegal under Wisconsin state law. In subsequent proceedings, the Wisconsin Supreme Court held the hearings to be violative of due process, despite the uncontested illegality of the strike. *Hortonville Joint School District No. 1* v *Hortonville Education Association*, 66 Wis 2d 469; 225 NW2d 658 (1975). The range of available disciplinary actions was held by the Wisconsin court to require greater impartiality than that provided by the Board.

On appeal, the United States Supreme Court reversed and held the disciplinary proceedings did not violate due process. In so holding, the majority addressed a claim that the Board was biased due to its involvement in the prior negotiations. The Court stated:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. *Withrow* v *Larkin*, 421 US 35, 47, 43 L Ed 2d 712, 95 S Ct 1456 (1975); *FTC* v *Cement Institute*, 333 US 683, 700-703, 92 L Ed 1010, 68 S Ct 793 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States* v *Morgan*, 313 US 409, 421, 85 L Ed 1429, 61 S Ct 999 (1941); see also *FTC* v *Cement Institute*, *supra*, at 701, 92 L Ed 1010, 68 S Ct 793."

Finally, in *Mathews* v *Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18, 33 (1976), the Supreme Court articulated a balancing test to be applied to determine the requirements of due process:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See *e.g.*, *Goldberg* v *Kelly*, *supra*, at 263-271, 25 L Ed 2d 287, 90 S Ct 1011."

Applying this test to the instant procedure, we do not find that the composition of the Appeal Board denied defendants their due process rights. While the private interests of appellants herein are substantial, there is no evidence indicating a risk of erroneous deprivation of such interests or that alternative procedures would offer greater protections. We thus find that the methods for appointment of Appeal Board members and their random placement on specific panels is not violative of the constitutional right to due process.[1]

Defendants also allege that the Appeal Board applied an incorrect test to determine the defendants' right to reimbursement from the prior settlement of the plaintiff's tort action. After quoting the statutory provisions covering dual liability and reimbursement, MCL 418.827(1), (5); MSA 17.237(1), (5)[2] the Board held:

> "The injury for which compensation is payable in this case is the aggravation at work of a prior nonwork-related injury; these are two distinct situations and may not be merged under Sec. 827 as defendant asserts. The employer takes the worker as he finds him and, irrespective of the employee's condition at that time, is responsible for any disability arising out of and in the course of the subsequent employment. This includes the aggravation of a prior nonwork-related debility which that employee has brought with him to the workplace. This is precisely the situation in this case, and defendant's argument is therefore rejected."

The Board apparently held the work-related aggravation of plaintiff's injury to be entirely separate from the original damage, thus precluding reimbursement under section 827. Apparently defendants claim that since the plaintiff could have recovered for the work-related aggravation of her knee injury from the tortfeasor, then the

employer and/or its carrier is entitled to reimbursement or a credit. Defendants cite no four-square authority for this proposition, but say that to hold otherwise would approve a windfall to the plaintiff contrary to *Epps* v *Mercy Hospital*, 69 Mich App 1; NW2d (1976). We believe the Appeal Board did not err but that reimbursement is only available where the injury for which compensation is payable under the act was caused by and creates liability in a third party. Defendants claim that the third party action was settled by the plaintiff before these defendants were aware of the claim against them and, therefore, before they had the opportunity to intervene. We do not think that a timely motion to intervene in the third party action below would have been granted unless it were alleged that the plaintiff was in the course of her employment when the automobile injury occurred. If the posture of the case came to us on a reverse determination by the Appeal Board we might have arrived at a different conclusion. In other words, if the defendants had persuaded the Appeal Board that Dr. Green's testimony regarding plaintiff's disability was solely attributable to the automobile accident, it might lead to a different conclusion. However, in this case the Appeal Board clearly found otherwise and the basis upon which it formed its conclusion is solidly supported by the record.

Affirmed.

FOOTNOTES

1. The third factor enumerated in *Mathews* v *Eldridge*, *supra*, the state's proprietary and administrative interests in maintaining the present system, is not a substantial consideration in this case. Unlike *Mathews*, in which a substantial change in administrative procedures would have resulted from a holding in favor of the plaintiff, the instant change in the Board's makeup would not significantly alter appellate practice within the WCAB.

2. The statute provides in pertinent part:

> "(1) Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with the provisions of this section. If the injured employee or his dependents or personal representative does not commence the action within 1 year after the occurrence of the personal injury, then the employer or carrier, within the period of time for the commencement of actions prescribed by statute, may enforce the liability of such other person in the name of that person.
>
> * * *
>
> "(5) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits."

APPENDIX B

DECISION OF THE WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE MAILED 08/02/77

MICHIGAN DEPARTMENT OF LABOR

BUREAU OF WORKERS' DISABILITY COMPENSATION

LANSING, MICHIGAN 48909

DECISION

Agnia Witonick (Employee) vs Jamson's, Inc. (Employer) (Vigilant Ins. Co.)

A hearing in this case was held 10-20, *12-9-76, *1-26 & *5-23-, 1977 in Detroit, Farmington & Southfield Michigan on petition of (plaintiff/~~defendant~~) I find as follows:

That the above named employee ~~was~~ (did not) receive a personal injury arising out of and in the course of ~~his~~ (her) employment by the above named employer on 5-6-74, and, as of said date ~~was~~, said employee had an average weekly wage of $208.40, ~~was~~ (unskilled) labor, and had the following dependents:

None

*Dependitises

IT IS THEREFORE ORDERED that said Defendant(s) pay compensation at the rate of $ per week for partial/total disability to said employee from 19 to 19 inclusive, and at the rate of $ from 19 to 19 inclusive, and partial/total disability to said employee from from 19 to 19 inclusive, and at the rate of $ 19 to 19 inclusive, and partial/total disability to said employee from 19 to 19 inclusive, and at the rate of $ 19 to 19 inclusive, and further, that said employee is still totally/partially disabled and Defendant(s) shall pay compensation at the rate of $ until further order of the Bureau and, that said Defendant(s) shall reimburse said employee $ for (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9 if applicable.

IT IS FURTHER ~~ORDERED~~ DECIDED that plaintiff has failed to sustain the burden of showing that her six months of employment (11-73 thru 5-74) was such an aggravating factor to neither accelerate the need for her surgeries of 5-74 and 2-75 nor to be the causative basis for such surgeries. In as much as the testimony of the two medical experts is so evenly divided, along so called partisan lines, I believe the testimony of either of the treating surgeons, Drs. Johnson or Shifrin, would have shed invaluable light upon which a more informed determination could have been made.

MAILED
AUG 02 1977
BUREAU of WORKMEN'S COMP.
LANSING, MICH.

Joseph L. Cyglinski
Administrative Law Judge

Signed this 14th day of July A.D. 1977

This award ~~is~~ (is not) stipulated by the parties.

~~Further compensation shall be paid voluntarily.~~

UNLESS A CLAIM FOR REVIEW IS FILED BY EITHER PARTY WITHIN FIFTEEN DAYS FROM THE DATE STAMPED HEREON AS "MAILING DATE", THIS DECISION SHALL STAND AS THE FINAL DECISION OF THE BUREAU OF WORKMEN'S COMPENSATION

NO ATTORNEY FEE IN EXCESS OF 20% OF THE COMPENSATION ACCRUED IS AUTHORIZED FOR CASES WHERE THE DATE OF INJURY WAS ON OR AFTER JULY 1, 1965 AND UP TO AND INCLUDING JUNE 30, 1972

APPENDIX C

OPINION OF THE WORKERS' COMPENSATION APPEAL BOARD MAILED 4/17/80

STATE OF MICHIGAN
WORKERS' COMPENSATION APPEAL BOARD

LYDIA PITONIAK,
Plaintiff,

vs.

BORMAN'S, INC., ALLSTATE INSURANCE COMPANY, and VIGILANT INSURANCE COMPANY,
Defendants.

This cause having come before the Appeal Board on appeal by plaintiff from the decision, mailed August 2, 1977, of Hearing Referee Chylinski, denying compensation benefits to plaintiff; after due consideration of the evidence taken and the briefs of counsel (the Board having made a finding of facts and law), and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be reversed, Now, Therefore;

IT IS ORDERED, That the decision of the Hearing Referee in this cause shall be and it hereby is reversed, and based on the undisputed average weekly wage of $208.40, no dependents, and a last day worked injury of May 5, 1974, the Board orders defendant to pay plaintiff weekly benefits of $101.00, commencing May 6, 1974 through the closing of proofs on May 23, 1977, and thereafter until further order of the Bureau.

Dated and entered at Lansing, Michigan, this 17th day of April, A.D. 1980;

WORKERS' COMPENSATION
APPEAL BOARD
William C. Marshall, Jr.
Ferris Arnold
Robert W. Kehres Members

STATE OF MICHIGAN
WORKERS' COMPENSATION APPEAL BOARD

LYDIA PITONIAK,
Plaintiff,

vs.

BORMAN'S, INC., ALLSTATE INSURANCE COMPANY, and VIGILANT INSURANCE COMPANY,
Defendants.

Appeal From Hearing Referee Chylinski

Roy C. Hebert & Linda K. Harris for plaintiff, Martin M. Summer for Borman's & Allstate Ins. Co., Arthur T. Iverson, Jr. & Jonathan T. Kopit for Borman's & Vigilant Ins. Co.

OPINION ON REVIEW

Arnold, Member of the Appeal Board

Plaintiff was involved in a nonwork-related automobile accident which, among other things, resulted in an injury to her left knee. Following a period of nine months off work, plaintiff returned to work for a period of six months and then went off work again and had not returned at the time of the hearing. The petition alleging that the work, which required constant standing, pathologically aggravated the prior injury to a state of disability, was denied following a hearing before Referee Chylinski. Plaintiff appealed. The issues are:

1. Whether plaintiff sustained her burden of proof to establish a compensable injury under the Act.

   And, if so,

2. Whether defendant is entitled to credit for the amount of the settlement plaintiff received as a result of the automobile accident.

This opinion reverses the prior denial of benefits and denies defendant credit for the amount of the settlement of the automobile accident for reasons hereinafter stated.

Plaintiff commenced employment with defendant as a clerk-cashier on December 8, 1958, and the following year was promoted to the position of head cashier; however, during January 1973, plaintiff resigned this position and resumed regular cashier duties.

On February 12, 1973, plaintiff was involved in an automobile accident which resulted in her being off work until November 12, 1973. Plaintiff described the injuries she sustained as a broken left kneecap, broken ribs, and injuries to the chin, left eye and ear; the emphasis was placed on the broken left kneecap with the other injuries only noted in passing. Plaintiff testified that following the injury, she was admitted to Seaway Hospital for a period of two weeks under the care of Dr. LaMontagne and that a cast was applied to her left leg from the ankle to a point midway up the thigh. When the cast was removed after six weeks, plaintiff testified she was unable to properly bend her leg and subsequently underwent outpatient therapy at Oakwood Hospital for a two-month period. Following the therapy, plaintiff explained that her leg felt better than it had previously and she was able to ambulate—first with the aid of two crutches, and then with only one crutch. Plaintiff stated she discontinued using the crutches entirely during August 1973 and she returned to work on November 12, 1973 "without pain" and her leg was "all right."

Plaintiff testified that approximately two months after she returned to work with defendant as a cashier, she began to experience pain and swelling in her left leg and began missing work as a result of these problems; plaintiff's testimony was that she missed 29 days of work from November

12, 1973 through her last day worked on May 5, 1974, and that this was primarily due to the pain and swelling which was becoming more severe in her left leg. Plaintiff also testified that she informed Mr. Tyloski, defendant's store manager, about her progressing problems and showed him the swollen leg on one occasion when he inquired why plaintiff's work was not completed. On April 6, 1974, plaintiff was promoted to assistant head cashier, but testified this job primarily involved stocking the shelves and relieving cashiers when the store was busy, thus still requiring her to be on her feet constantly. Plaintiff's last day worked was on May 5, 1974.

On May 6, 1974, plaintiff saw Dr. Verne Johnson who subsequently performed surgery on plaintiff's left knee on May 31, 1974 during a 13-day period of hospitalization at Wyandotte General. Plaintiff continued to treat with Dr. Johnson through January 20, 1975, but testified at the hearing that this surgery and subsequent treatment had not helped alleviate the pain and swelling. Therefore, plaintiff's family physician, Dr. Dzuiba, referred her to Dr. Shifrin who performed an additional surgery on plaintiff's left knee at New Grace Hospital during February 1975. At the hearing of this matter, plaintiff testified that her left leg is worse now than at the time of her November 12, 1973 return to work and:

"Q Did it get better, or worse after Dr. Shifrin's surgery, or stay the same?

A It stayed the same.

Q And, what are your complaints today?

A I can not walk on that leg. It hurts, and if I walk on the crutch, you see, I cannot—it swells up, and if I am even laying in bed, I cannot lift that leg even to bring it from under the blankets. If I

wake up, I have to move my leg with my hand, and I have a very bad pain right over here.

THE COURT: Indicating the patella area."

Plaintiff further testified that since the May 31, 1974 surgery, she has been unable to walk without the aid of crutches.

The expert testimony of Milton Green, M.D., and Richard H. Hall, M.D., was submitted into evidence via deposition; both are board-certified orthopedic surgeons. Dr. Green examined plaintiff on April 6, 1976, and testified that he received the following history:

". . . The patient returned to work in November, 1973. Even prior to her return, her knee was swollen, painful, and tended to give way. After working two weeks, she had increased difficulties and had to stop work again. Her job required frequent standing and walking and putting up stock. She then consulted a doctor and returned to work until May of 1974. . . ."

Defendant argues the above history is contradictory with plaintiff's hearing testimony and shows that plaintiff's left knee was not recovered when she returned to work and that work produced no more than a symptomatic aggravation. We reject this argument. Plaintiff's extensive and credible testimony convinces us as fact finders that her knee was "all right" when she returned to work, and that she was initially able to ambulate and stand on her feet for eight hours a day without crutches and without experiencing pain or swelling. Furthermore, defendant had Mr. Tyloski, the store manager, whom they could have called as a witness to rebut this testimony had they chosen to. However, Mr. Tyloski was not called to testify.

Dr. Green further testified in pertinent part:

". . . On examination, the patient walks using a crutch in the right hand. Her left knee shows range of motion of 10-90°. There is no effusion. There is a standard median parapatellar scar, a direct medical posterior scar, and a long anterolateral scar. The knee is stable. One cannot do McMurray test because of the limited flexion. There is diffuse tenderness. There was one inch atrophy of the left thigh as compared to the right.

X-ray, including weight bearing films of left knee reveal that there has been a lateral Marmor hemi-joint replacement. The tibial component is tilted slightly downward in its anterior aspect. There is elongation and sharpening of the tibial spines. There is degenerative change in the medial aspect of the joint which on weight bearing films show definite varus putting weight upon this segment of the joint.

At this time, Mrs. Pitoniak shows very distinct impaired function of left knee. The precise direct cause is difficult to state as it may well be the continued degenerative medial joint changes which are bearing most of her weight in spite of the lateral hemi-arthroplasty. I really cannot see why this is a Workmen's Compensation case, as all these things could certainly be more directly related to the automobile accident than to anything else. She does not tell me of any on-the-job injury. I feel this knee would be as it is today whether she had returned to work or not. It is very likely that a total joint replacement will be needed but first all secondary gain and other motivation of this type must be eliminated."

Dr. Green acknowledged that daily activities, such as standing and walking, do contribute to wear on the joints

of the knee but opined that plaintiff's work activities were only a symptomatic aggravation and merely demonstrated the need for surgery rather than necessitating the surgery.

Dr. Hall examined plaintiff on April 5, 1976 and obtained examination and x-ray findings comparable to those of Dr. Green. Dr. Hall opined that plaintiff is disabled from performing any work where she would be on her feet for any length of time. Dr. Hall acknowledged that, without seeing the original x-rays, he could not determine if plaintiff's original injury was a fractured patella, or a comminuted fracture involving the articulating surface of the tibia with compression of the lateral tibial plateau involving the knee joint. However, both involve weight-bearing surfaces of the knee joint and, in this regard, Dr. Hall testified:

"A . . . Where I think this lady got it was the weight-bearing under—and motion under weight-bearing where it just continued to work away at the knee joint."

And:

"A I think that anything a person does, does contribute, especially if this lady—we'll talk about specifics—what this lady was doing in some way contributed to the wear and tear and the eventual need for surgery on this knee after the cast was removed.

Q (By Mr. Iverson) And which is why you say that the operatve procedures that she has undergone since the original trauma probably came a little faster because she did go back to work for that six months?

A Yes, if the work was something that would be more than she would normally do at home, meaning you're going to have trouble with you knee joint with any weight-bearing as long as you use it climbing stairs and wherever you go, whatever you do it's going to continue to kind of wear away on it.

She did more work at her job, was on her feet more than she would normally have done at home, then the job, I think, is responsible—and I'm not trying to say who's responsible or not but I'm getting into the question, I've got to at least put my two cents in someway—is responsible for the deterioration of that knee joint if it was more, if she did more on her job than she would have done at home."

Also:

"Q . . . Assuming her testimony, which was under oath, to be true, have you an opinion whether or not her return to work in November of 1973 and her continued work for five or six months as I have described could have aggravated the prior preexisting injury to her left knee?

A Oh, I'd say it's a good possibility that it had a moderate amount of—let's say, more than 50 percent of—the word escapes me right at this moment—a moderate amount of influence on the progression of this problem which led her to have that second operation, yes.

Q Have you an opinion, based on your examination, which was a history, physical examination, x-rays, diagnosis, and the hypothetical that I have just asked you about concerning her return to work

and her job description, whether or not during the five or six months that she returned to work at the duties I described to you, that work that she did could have contributed to the present condition of her left knee?

MR. IVERSON: I would object to that. It's been asked and answered.

MR. HEBERT: No, I asked if it aggravated it. I'm utilizing a different terminology.

MR. IVERSON: You used aggravated before?

MR. HEBERT: Yes.

MR. IVERSON: Okay, go ahead then, Doctor.

A I would say that—we have had an operation in between the time of her working. I would say that her working did—or led her to having to have the operative procedure faster than if she were not working, and the operative procedure is what I'm seeing today, trying to be so horribly specific in this."

The testimony of Dr. Hall and that of plaintiff convinces us as fact finders that plaintiff's return to work for a six-month period on a job which required her to stand on her feet for eight hours a day did pathologically aggravate her pre-existing injury and thus brought about the subsequent surgical procedures sooner than would have otherwise been the case.

Defendant next asserts:

"If it is found that the defendants are liable to the plaintiff for Workers' Compensation, then under MCLA 418.827; MSA 17.237 (827) the defendants should be given credit for the $33,500.00 that the plaintiff received as the result of her third party suit."

We do not agree. MCLA 418.827 reads in pertinent part:

> "418.827 Dual liability; action; settlement; recovery; expenses; benefits; inspections.
>
> Sec. 827. (1) *Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof,* the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with the provisions of this section. . . ." (Emphasis added)
>
> * * * * *
>
> (5) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments or compensation benefits."

The injury for which compensation is payable in this case is the aggravation at work of a prior nonwork-related injury; these are two distinct situations and may not be

merged under Sec. 827 as defendant asserts. The employer takes the worker as he finds him and, irrespective of the employee's condition at that time, is responsible for any disability arising out of and in the course of the subsequent employment. This includes the aggravation of a prior nonwork-related debility which that employee has brought with him to the workplace. This is precisely the situation in this case, and defendant's argument is therefore rejected.

The prior decision denying benefits is reversed. Based on the undisputed average weekly wage of $208.40, no dependents, and a last day worked injury of May 5, 1974, plaintiff is entitled to weekly benefits of $101.00. These benefits shall commence May 6, 1974 through the closing of proofs on May 23, 1977, and thereafter until further order of the Bureau.

Marshall and Kehres concurring.

Dated and entered at Lansing, Michigan, this 17th day of April, A.D. 1980;

WORKERS' COMPENSATION
APPEAL BOARD
William C. Marshall, Jr.
Ferris Arnold
Robert W. Kehres Members

FLA:md

APPENDIX D

ORDER OF THE MICHIGAN COURT OF APPEALS GRANTING THE DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL, NO. 51660, CERTIFIED 9/26/80

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit on the twenty-second day of September in the year of our Lord one thousand nine hundred and eighty.

Docket #51660

LYDIA PITONIAK,
Plaintiff-Appellee,

v

BORMAN'S INC., and VIGILANT INSURANCE COMPANY,
Defendants-Appellants,

and

ALLSTATE INSURANCE COMPANY,
Defendant.

Present the Honorable DOROTHY COMSTOCK RILEY
Presiding Judge

JOHN H. GILLIS, MICHAEL J. KELLY Judges

AMENDED ORDER

In this cause an application for leave to appeal, together with a motion for immediate consideration thereof, is filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application for leave to appeal be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED ON THE COURT'S OWN MOTION that the time for taking all steps on appeal required under the rules be, and are hereby reduced by one-half pursuant to GCR 1963, 820.1(7), and no extensions of time shall be had except upon order of the Court of Appeals.

Judge Riley votes to deny the application for leave to appeal.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 26th day of September in the year of our Lord one thousand nine hundred and eighty.

/s/ Ronald L. Dzierbicki
Clerk

APPENDIX E

MICHIGAN SUPREME COURT ORDER, NO. 66990, DATED 9/02/81

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 2nd day of September in the year of our Lord one thousand nine hundred and eighty one.

SC: 66990
CoA: 51660
LC: WCAB
CR 33-291

LYDIA PITONIAK,
Plaintiff-Appellee,

v

BORMAN'S INC., and VIGILANT INSURANCE COMPANY,
Defendants-Appellants,

and

ALLSTATE INSURANCE COMPANY,
Defendant.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of September in the year of our Lord one thousand nine hundred and eighty one.

/s/ Corbin R. Davis
Deputy Clerk

APPENDIX F

APPELLANT'S NOTICE OF APPEAL FILED WITH THE MICHIGAN SUPREME COURT 10/01/81

STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No: 66990
Court of Appeals
No: 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

v.

BORMAN'S INC., and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

PROOF OF SERVICE

Plunkett, Cooney, Rutt, Watters,
Stanczyk & Pedersen
By: Jonathan T. Kopit (P24250)
Attorneys for Defendant-Appellant
1695 Woodward Avenue
Suite 210
Bloomfield Hills, Michigan 48013
(313) 646-0930

Levine & Benjamin
Attorneys for Plaintiff-Appellee
1100 City National Bank Building
Detroit, Michigan 48226
(313) 961-7284

STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No: 66990
Court of Appeals
No: 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

v.

BORMAN'S INC., and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Borman's, Inc. and Vigilant Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Michigan, certified on September 2, 1981, refusing to grant their Application for Leave to Appeal and thereby affirming the decision of the State of Michigan Court of Appeals released on September 15, 1981, affirming the decision of the Michigan Workers' Compensation Appeal Board mailed April 17, 1980.

This appeal is taken pursuant to 28 USC §1257(2).

Plunkett, Cooney, Rutt, Watters,
Stanczyk & Pedersen
By: Jonathan T. Kopit (P 24250)
Counsel for Appellant
1695 Woodward Ave., Ste. 210
Bloomfield Hills, MI 48013
(313) 646-0930

DATED: September 30, 1981

STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No: 66990
Court of Appeals
No: 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

v.

BORMAN'S INC., and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

Patricia L. Kerr, being duly sworn, deposes and says that on the 30th day of September, 1981, she deposited in the United States Mail at Bloomfield Hills, Michigan, a copy of the attached Notice of Appeal to the Supreme Court of the United States, and this Proof of Service, addressed to:

Levine & Benjamin
Attorneys at Law
1100 City National Bank Bldg.
Detroit, MI 48226

With sufficient postage prepaid thereon.

.....

Subscribed and sworn to before me this 30th day of September, 1981.

.....
Notary Public

APPENDIX G

APPELLANT'S NOTICE OF APPEAL FILED WITH THE COURT OF APPEALS OF THE STATE OF MICHIGAN 11/04/81

STATE OF MICHIGAN
IN THE COURT OF APPEALS

No. 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

vs.

BORMAN'S, INC. and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

PROOF OF SERVICE

Plunkett, Cooney, Rutt, Watters,
Stanczyk & Pedersen
By: Jonathan T. Kopit (P24250)
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1695 Woodward Avenue
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(313) 646-0930

STATE OF MICHIGAN
IN THE COURT OF APPEALS

No. 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

vs.

BORMAN'S INC. and VIGILANT
INSURANCE COMPANY,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Borman's, Inc. and Vigilant Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Michigan, certified on September 2, 1981, refusing to grant their Application for Leave to Appeal and the decision of the State of Michigan Court of Appeals, released on September 15, 1981, affirming the decision of the Michigan Workers' Compensation Appeal Board mailed April 17, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Plunkett, Cooney, Rutt, Watters,
Stanczyk & Pedersen
By: Jonathan T. Kopit (P24250)
Attys for Defendants-Appellants
1695 Woodward Avenue
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STATE OF MICHIGAN
IN THE COURT OF APPEALS

No. 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

vs.

BORMAN'S INC. and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

Patricia L. Kerr, being duly sworn, deposes and says that on the 4th day of November, 1981, she deposited in the United States Mail at Bloomfield Hills, Michigan, a copy of the attached Notice of Appeal to the Supreme Court of the United States, and this Proof of Service, addressed to:

Mr. Barrie Bratt
Attorney at Law
1100 City National Bank Bldg.
Detroit, MI 48226

Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

With sufficient postage prepaid thereon.

/s/ Ka

Subscribed and sworn to before me this 4th day of November, 1981.

.....

Notary Public

APPENDIX H

(Received October 21, 1981)

AFFIDAVIT OF WORKERS' COMPENSATION APPEAL BOARD CHAIRMAN, MICHAEL J. GILLMAN

LYDIA PITONIAK,
Plaintiff-Appellee,

v.

BORMAN'S, INC. and VIGILANT INSURANCE COMPANY,
Defendants-Appellants.

AFFIDAVIT OF MICHIGAN WORKERS' COMPENSATION APPEAL BOARD CHAIRMAN, MICHAEL J. GILLMAN

STATE OF MICHIGAN)
) ss:
COUNTY OF .....)

MICHAEL J. GILLMAN, the duly appointed Chairman of the Michigan Workers' Compensation Appeal Board deposes and says:

1. That he is the official responsible for the administrative operations of the Workers' Compensation Appeal Board.

2. That this Tribunal mailed its decision in *Lydia Pitoniak* v. *Borman's, Inc., Allstate Insurance Company and Vigilant Insurance Company* on April 17, 1980.

3. That the panel consisted of Member Ferris Arnold, a Member "representative of employee interests" in the

state, Member Robert W. Kehres, a Member "representative of employee interests" in the state and Member William C. Marshall, Jr. At the time the decision was mailed, Member Marshall was undesignated. In January of 1981, Member Marshall was designated as a Member "representative of employee interests" in the state.

4. That the make-up of the Appeal Board panel was not a public record before the mailing of the decision.

Further, deponent sayeth not.

/s/ Michael J. Gillman
Michael J. Gillman, Chairman
Michigan Workers' Compensation Appeal Board

Subscribed and sworn before me this 27th day of October, 1981.

/s/ Martha J. Dee
Notary Public, Martha J. Dee

Commission Expires September 15, 1985

APPENDIX I

AFFIDAVIT OF ASSISTANT MICHIGAN SUPREME COURT CLERK, CORBIN R. DAVIS

STATE OF MICHIGAN—ss.

I, HAROLD HOAG, Clerk of the Michigan Supreme Court, hereby certify that the annexed is a true and correct copy of the cover sheet and pages i and iv of the Brief in Support of application for Leave to appeal filed April 7, 1981 in Pitoniak v Borman's Inc. et al No 66990 and that I have compared it with the original document as the same appears in the files and records of this Court and that it is a true transcript therefrom, and the whole of said record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 20th day of October, 1981.

/s/ Corbin R Davis
Deputy Clerk

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal From the Court of Appeals)

No. .....

Court of Appeals
no. 51660

LYDIA PITONIAK,
Plaintiff-Appellee,

vs.

BORMAN'S INC. and VIGILANT
INSURANCE COMPANY,
Defendants-Appellants,

and

FERRIS ARNOLD, NANCY DAY, JOHN J. HAYS,
JOHN HOUSTON, ROBERT W. KEHRES, and
JANET HUNTLEY PHELPS,
Intervenors.

BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

and

PROOF OF SERVICE

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Watters, Stanczyk &
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ARGUMENT I 6

The Defendants Were Deprived Of Their Due Process Right To A Fair Hearing Because, While The Appeal Board Panel That Decided This Case Included Two Members That Were "Representative Of Employee Interests Of The State . . .", And One Member That Was Later Appointed As An "Employee Representative", There Were No Panel Members That Were "Representative Of Employer Interests In The State".

ARGUMENT II 17

The Appeal Board Applied The Wrong Test When It Determined That The Defendants Were Not Entitled To Credit For The $50,000.00 Settlement Received By The Plaintiff For Her Knee Injury. The Test For Reimbursement Is Not Whether The Plaintiff's Work Aggravated A Preexisting Condition, But Whether The Plaintiff's Disability Was "Caused Under Circumstances Creating A Legal Liability . . ." In A Third Person.

RELIEF 26

STATEMENT OF THE QUESTIONS PRESENTED

I. Were The Defendants Deprived Of Their Constitutional Right To A Fair Hearing Because The Appeal Board Panel That Decided This Case Was Made Up Of Two Members That Were "Representative Of Employee Interests In The State", One Member Who Was Later Appointed As An "Employee Representative" And No Members That Were Representative Of Employer Interests In The State"?

The Defendants-Appellants say "Yes".

The Plaintiff-Appellee says "No".

The Intervenors say "No".

The Court of Appeals said "No".

The Workers' Compensation Appeal Board was not presented with this question because the parties were not apprised of the make up of the Appeal Board panel until the Appeal Board decision was mailed.

II. Did The Appeal Board Apply An Incorrect Test In Denying The Defendants Credit For The Plaintiff's $50,000.00 Settlement With The Driver Of The Automobile That Caused Her Knee Disability?

The Defendants-Appellants say "Yes".

The Plaintiff-Appellee says "No".

The Intervenors are not involved in this question.

The Court of Appeals said "No".

The Workers' Compensation Appeal Board said "No".

Opposition

Office - Supreme Court, U.S.
FILED
DEC 23 1981
ALEXANDER L. STEVAS.
CLERK

81-961

No. ——

IN THE

Supreme Court of the United States

October Term, 1981

VIGILANT INSURANCE COMPANY,
Appellant,
v
LYDIA PITONIAK,
Appellee.

On Appeal from the Court of Appeals
of the State of Michigan

APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE DECISION OF THE MICHIGAN COURT OF APPEALS

STATE CIVIL CASE

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TABLE OF AUTHORITIES CITED

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No. ——

IN THE

Supreme Court of the United States

October Term, 1981

VIGILANT INSURANCE COMPANY,
Appellant,
v
LYDIA PITONIAK,
Appellee.

On Appeal from the Court of Appeals
of the State of Michigan

APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE DECISION OF THE MICHIGAN COURT OF APPEALS

STATE CIVIL CASE

NOW COMES Appellee, LYDIA PITONIAK, by and through her attorneys, LEVINE & BENJAMIN, P.C., and for her Motion to Dismiss Appeal or in the Alternative to Affirm the Decision of the Michigan Court of Appeals states as follows that:

1. This is a case of work-related personal injury arising under the Michigan Workers' Compensation Act, MCLA 418.101 *et seq*.

2. Appellee was originally denied workers' compensation benefits in a decision of the Administrative Law Judge mailed August 2, 1977 (Appellant's Appendix A12).

3. Appellee made timely and proper appeal of the denial of benefits to the Michigan Workers' Compensation Appeal Board, and in a Decision mailed April 17, 1980, the Appeal Board reversed the Decision of the Administrative Law Judge and awarded full and continuing benefits to Appellee (Apellant's Appendix A13).

4. Appellant sought and was granted Leave to Appeal the Decision of the Workers' Compensation Appeal Board before the Michigan Court of Appeals, solely on the issue of whether Appellant had been deprived of its Fourteenth Amendment due process right to a hearing before a fair and impartial administrative tribunal because the three-member Appeal Board panel was composed of two "employee interest" and no "employer interest" members.

5. In an Opinion published March 18, 1981, the Michigan Court of Appeals affirmed the Decision of the Appeal Board awarding benefits to Appellee, holding that Appellant had not established a "probability of actual bias on the part of the judge or decision-maker . . . too high to be constitutionally tolerable," under guidelines established within decisions of this Honorable United States Supreme Court such as *Withrow v. Larkin*, 421 U.S. 35; 95 S. Ct. 1456; 43 L. Ed. 2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564; 93 S. Ct. 1689; 36 L. Ed. 2d 488 (1973); *Ward v. Monroeville*, 409 U.S. 57; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510; 47 S. Ct. 437; 71 L. Ed. 2d 749 (1927), and of the Michigan

Supreme Court such as *Crampton v. Department of State*, 395 Mich. 347, 235 NW2d 352 (1975) (Appellant's Appendix A1).

6. Appellant sought and was denied Leave to Appeal the decision of the Michigan Court of Appeals before the Michigan Supreme Court, in an Order of said Court dated September 2, 1981 (Appellant's Appendix A26).

7. The Decision of the Michigan Court of Appeals, which utilized guidelines established by the Michigan Supreme Court in *Crampton v. Department of State, supra*, rested on adequate and independent state grounds in the form of interpretive state case law and thus the instant appeal should be dismissed as posing no substantial federal question for the consideration of this Honorable United States Supreme Court.

8. The Decision of the Michigan Court of Appeals in the instant case should be affirmed because reversal would not lead to a different result; to wit, a due process interpretation of the state statute at issue favorable to appellant would not result in significant alteration of the basic method of composition of the Appeal Board in existence at the time. Panel members, per the statute then in effect, were required to be rotated as evenly as possible among all panels on a random basis. Because employee and employer interest members outnumbered general public members four to one, the odds were overwhelming in favor of panels containing two or more employee or employer interest members. Such a composition was and is dependent purely on "luck of the draw" and not, as appellant attempts to argue, on any intentional or biased weighting of the panels. Due process considerations require that such random

placement be continued unaltered. As stated by the Michigan Court of Appeals in footnote 1 of its Opinion:

> . . . the state's proprietary and administrative interests in maintaining the present system, is not a substantial consideration in this case. Unlike *Mathews*, in which a substantial change in administrative procedures would have resulted from a holding in favor of the plaintiff, the instant change in the Board's makeup would not significantly alter appellate practice within the WCAB.

See Herb v. Pitcairn, 324 U.S. 117 (1945).

9. The instant appeal should be dismissed for the further reason that it was not taken in conformity with statutory rule, to wit: 28 USC sec. 1257 limits appellate review by this Honorable Supreme Court to "judgments or decrees rendered by the *Highest* court of a State in which a decision could be had." In the instant case, the Highest Court of the State, the Michigan Supreme Court, has refused to render a decision because it "is not persuaded that the question presented should be reviewed by this court." As such, appellant's present appeal does not stem from the highest court of last resort in the State, and should be dismissed on that ground alone.

10. The issues involved in the instant appeal are purely matters of state substantive law, namely, a state court's interpretation of a state workers' compensation statute, with said interpretation being "fairly supported" in state case law alone. *Williams v. Georgia*, 349 U.S. 375 (1955). Since no substantial federal question exists, summary disposition *via* dismissal, or in the alternative,

affirmation of the Michigan Court of Appeals, on insubstantiality grounds, is clearly warranted.

WHEREFORE, Appellee prays this Honorable United States Supreme Court grant her Motion to Dismiss or in the Alternative to Affirm the Decision of the Michigan Court of Appeals.

Respectfully submitted,

LEVINE & BENJAMIN, P.C.
By: Gerald Benjamin
(Barrie R. Bratt)
Attorneys for Appellee
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(313) 961-7284

Dated: December 18, 1981